ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT OF 1996	CC Docket No. 96-238
AMENDMENT OF RULES GOVERNING PROCEDURES TO BE FOLLOWED WHEN FORMAL COMPLAINTS ARE FILED AGAINST COMMON CARRIERS	

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 500 interexchange, international, local and wireless resale carriers and their underlying product and service suppliers, offers the following reply comments on the Commission's proposal to streamline and strengthen the effectiveness of the existing formal complaint process, as a general matter and in keeping with specific provisions of the Telecommunications Act of 1996.

TRA urges the Commission to retain the availability of discovery, of critical importance in resale carrier/service provider disputes since the disparity in access to information between network service providers and their resale carrier customers is, and will remain, heavily weighted in favor of network service providers. TRA agrees that an increased efficiency may flow from a modest expansion of Commission Staff oversight of aspects as the establishment of timetables within which discovery must be initiated and completed, or the granting of discovery opportunities beyond those afforded as of right. TRA nevertheless continues to urge the Commission not to unduly restrict the ability of the parties themselves to pursue such discovery as they, in their reasonable opinion, deem desire for the development of a full record.

TRA also supports those commenters which encourage the Commission to increase the effectiveness of the formal complaint process through adoption of such measures as reduction of the time for filing answers, allowing complaints based upon "information and belief" supported by available facts and affidavits in appropriate situations, and reliance on -- but not abuse of -- the protections afforded by § 1.731 to facilitate the disclosure of essential information, even if such information would be otherwise confidential or proprietary in nature.

TRA, however, urges the Commission to reject suggestions of various commenters which will restrict the effectiveness of a streamlined formal complaint process by placing unduly burdensome evidentiary and other obligations upon potential complainants. Thus, the Commission should reject suggested modifications to the formal complaints process which would inconvenience both Commission Staff and parties by requiring hearings on disputed facts at the location where services were rendered, provide for the exchange of significantly less than complete information regarding relevant documents and individuals with knowledge of relevant facts, and/or impose significant delays on a complainant's ability to file its initial complaint.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking, FCC 96-460, released by the Commission in the captioned docket on November 27, 1996 (the "Notice"), pursuant to which the Commission proposes to establish streamlined complaint procedures in satisfaction of the accelerated deadlines imposed by the Telecommunications Act of 1996[1] and to generally enhance the effectiveness of the existing formal complaint process to encourage and facilitate the timely, equitable resolution of formal complaints lodged against common carriers.

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

I.

INTRODUCTION

The Comments filed in this proceeding by those entities whose economic livelihoods are most profoundly affected by the decisional delays unavoidably imposed by the Commission's current formal complaints mechanism evidence an overwhelming approval of a majority of the Commission's proposals. The most notable exception to that overall supportive tone arises in connection with the Commission's request for industry input on the advisability of prohibiting discovery as a matter of right. TRA joins those commenters which have stressed the continuing necessity for discovery, of particular importance in resale carrier/service provider disputes since the disparity in access to information between network service providers and their resale carrier customers remains heavily weighted in favor of the network service providers. Accordingly, TRA again urges the Commission to maintain the availability of discovery devices as an essential component of a complaint process designed to reach speedy yet equitable outcomes.

TRA agrees with those commenters who, among other things, urge the Commission (i) to reduce the time for filing answers, (ii) to accept complaints based upon "information and belief" supported by affidavits and information currently available to complainant, and (iii) to enforce the protections afforded by §1.731 to require defendants to disclose all information relevant to the resolution of the dispute without allowing the invocation of -- and reliance upon -- the Section to become a defendant carrier's routinely utilized dilatory instrument.

TRA, however, urges the Commission to refrain from imposing suggested additional burdens upon complainants, the most egregious of which would (i) require hearings on disputed facts at the location where the services were rendered, (ii) allow parties to evade identification of knowledgeable individuals and/or relevant documents, and (iii) prohibit the initial filing of a complaint for up to 90 days after complainant has given defendant notice of the intent to file a complaint. Not surprisingly, attempts to convince the Commission to erect additional procedural and evidentiary burdens upon complainants and to add significant lead time to the ability to file complaints have been voiced almost exclusively by those entities which will rarely enter the formal complaint process in the posture of a complainant. Adoption of such measures would essentially nullify the benefits a more evenhandedly implemented complaint process could provide the entities most in need of the streamlined forum envisioned by the Commission.

II.

ARGUMENT

A. The Commission Should Secure to Complainants the Ability to Pursue Sufficiently Liberal Discovery Devices to Ensure the Development of A Full Evidentiary Record.

As TRA's Comments in this and other proceedings demonstrate, TRA has long been an ardent proponent of a mandatory, efficiently-streamlined, highly expedited and fully-binding process for the prompt and equitable resolution of carrier-to-carrier disputes.[2] As such, TRA finds much that is commendable in the Commission's Notice. TRA continues to urge the

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[2] *See, e.g.,* Comments of the Telecommunications Resellers Association in GN Docket No. 96-113, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, filed September 27, 1996.

Commission, however, that in its implementation of a streamlined formal complaint process, a complainant's access to discovery tools sufficient to allow the full development of its claims against a defendant common carrier should not be diminished in any significant degree, and certainly should not be eliminated.

As TRA noted in its Comments, resale carriers, because of their unique vulnerability to anticompetitive abuses and other unlawful conduct, have a disproportionate need for a forum capable of providing highly expedited and fully-binding resolutions of carrier-to-carrier disputes. Not only are resale carriers generally dwarfed in size and resources by their underlying network service providers, but they are entirely dependent upon these carriers for the wholesale services necessary to provide retail services to their customers. Resale carriers thus have a compelling need for a forum in which they can secure prompt relief from anticompetitive abuses perpetrated by their underlying network service providers. A complaints resolution forum which provides little or no opportunity for discovery, TRA submits, will provide no realistic hope for equitable resolution of carrier-to-carrier claims to those small carriers which will be most acutely reliant upon such a forum.

As the Commission is aware, a party in a position to deny something of value, or to act in a manner injurious, to another party and to defer through legal maneuvering regulatory intervention addressing such conduct will benefit from a cumbersome and costly complaint process while the party so denied or injured will suffer.[3] It is no surprise, then, that the most

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[3] As the Commission has acknowledged:

> The delays that occur under our current rules will be problematic for all carriers and, in the newly deregulated telecommunications market, small

extreme proposals to curtail discovery within the formal complaint process have been raised by primarily large, well-entrenched entities which have much to gain through the preservation of cumbersome, costly and above all time-consuming processes.

TRA strongly opposes the position of Southwestern Bell supporting "removing discovery entirely from the formal complaint procedure, as long as defendants have the right to remove any formal complaint to federal court."[4] Such an action would present an unavoidable conflict with the Commission's enunciated goals of facilitating not only "faster resolution of all formal complaints" but also "full and fair resolution of complaints filed under the new statutory complaint provisions[5] since only two results are likely to flow from Southwestern Bell's proposal: (1) complaints will be resolved quickly because complainants will be denied access to information necessary to fully develop their claims, or (2) at *defendant's* option, the action would be removed to a judicial forum to the tactical advantage of the party most benefitted by maintenance of the status quo.

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businesses and new entrants will be particularly vulnerable.[53]

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[53] . . . Some commenters in the Section 257 proceeding cite delay under our current rules as a potential barrier to entry and to effective enforcement. The revisions proposed herein are designed to expedite the process for all carriers, thereby eliminating the real and perceived barriers cited by the commenting parties in the Section 257 proceeding.

Notice at ¶ 21.

4 Comments of Southwestern Bell Telephone Company at p. 6.

5 Notice at ¶ 2.

TRA finds particularly persuasive the position of Teleport Communications that

> [p]re-filing investigations, no matter how thorough, inevitably have limitations beyond the control of the complainants. Important documents and justifications concerning a defendant LEC's rates and practices are commonly in the exclusive possession of the LEC and can only be obtained by a complainant through the discovery process. Complainants therefore need a certain degree of self-executing discovery as a matter of right in order to obtain the information they need to establish their claims. . . . self-executing discovery is crucial to the elucidation of evidence and the production of a useful record, in order to guarantee parties due process.[6]

As MCI points out, "[u]sually it is the defendant that possesses most of the information relevant to the complaint, and defendants are not likely to proffer such material voluntarily in their answers."[7] And MFS Communications Company goes so far as to suggest "the wholesale elimination of discovery would unduly prejudice the rights of all parties involved in the formal complaint process . . . The reliability and fairness of any decision rendered in that process would be subject to question."[8]

TRA has acknowledged that an increased efficiency may flow from a modest expansion of Commission Staff oversight of certain elements of the discovery process. Thus, TRA would not oppose Commission oversight of such ministerial aspects as the establishment of timetables within which discovery must be initiated and completed, or the granting of discovery opportunities beyond those afforded as of right. TRA continues to believe, however,

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[6] Comments of Teleport Communications Group, Inc. at p. 3.

[7] Comments of MCI Telecommunications Corporation at pp. 18-19.

[8] Comments of MFS Communications Company at pp. 9-10.

that a complainant must be afforded both the opportunity and the tools with which to develop and present its case and thus continues to oppose the imposition of limitations which would restrict the extent or scope of discovery beyond those already incorporated in the Commission's procedural rules.[9] TRA reminds the Commission that it is the parties to an action which bear all risks and obligations with respect to the eventual outcome. It is entirely appropriate, then, that those parties themselves should be provided sufficient latitude, within reasonable bounds, to follow their own best judgment in determining the scope and direction of discovery.

On a related point, TRA notes that several parties[10] oppose the Commission's proposed conclusion that both complaints and answers must include, among other things, "a description by category and location of all documents . . . that are relevant to the disputed facts alleged" and "the name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts alleged. . ."[11] Bell Atlantic proposes limiting disclosure to "up to five persons who have the most knowledge of the matter, and up to twenty relevant documents that have not already been submitted voluntarily."[12] Pacific Telesis seeks the ability to "amend designations [of individuals and documents] without leave of the

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[9] Notice at ¶¶ 51 - 52.

[10] Comments of Cincinnati Bell Telephone Company at p. 8; Comments of NYNEX at p. 7; Comments of Pacific Telesis Group at pp. 11-13.

[11] Notice at ¶¶ 23, 24.

[12] Comments of Bell Atlantic at p. 5.

Commission, if as the proceeding moves forward the issues become more refined or different than they first appeared."[13]

As discussed below, much of the requested information will be accumulated by the parties in the course of pre-filing discussions regarding the dispute and should therefore be readily available for submission with both complaints and answers. The purported burden on defendants relied upon by commenters opposing the information exchange requirement thus appears grossly overstated. Accordingly, TRA urges the Commission to reject these attempts to evade identification of knowledgeable individuals and/or relevant documents, a tactic which would work to the detriment of the dispute resolution process as a whole by further hampering discovery attempts.

B. The Commission Should Adopt the Majority of its Proposals to Increase the Efficiency of the Formal Complaint Process and Accelerate the Rendering of Decisions.

The Commission's complaint process as currently structured remains too cumbersome and time-consuming to offer a significant degree of relief from network carriers' oftentimes blatant disregard for the Commission's Rules. Adoption of many of the proposals outlined by the Commission in its Notice, coupled with the preservation to parties of essential discovery opportunities, should go far, however, toward creating a more responsive forum for the consideration and prompt resolution of such disputes.

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[13] Comments of Pacific Telesis Group at p. 14.

TRA agrees with those commenters who support the reduction of the time within which answers to formal complaints must be filed.[14] Indeed, as USTA notes, the "compressed time frames" dictated by the 1996 Act lead to the conclusion that a reduction from 30 days to 20 days for answering complaints "is probably inevitable."[15] In light of the 20 day response time which defendants routinely meet pursuant to Fed.R.Civ.Proc. 12(a)(1)(A), TRA finds particularly unconvincing BellSouth's blanket assertion that "a thirty day response time for an Answer is the minimum time necessary to adequately defend a formal complaint."[16] Under the proposal outlined in the Notice, defendants will be presented with a complaint which provides "a detailed explanation of the manner in which a defendant has violated the Act, Commission Order, or Commission rule in question" as well as identifying information concerning each individual likely to have discoverable information relevant to the disputed facts and, at a minimum, descriptions of relevant documents.[17]

Further, receipt of a complaint will hardly take a defendant unawares, since the Commission also proposes to require, and TRA supports, the submission of a certification by the complainant that "it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant carrier's representative(s) prior to filing the complaint."[18] In the course of this

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[14] Comments of America's Carriers Telecommunications Association at p. 5; Comments of GST Telecom, Inc. at p. 9; Comments of AT&T Corp. at p. 11.

[15] Comments of United States Telephone Association at p.4.

[16] Comments of BellSouth Corporation at ftnt.44.

[17] Notice at ¶¶ 40, 43.

[18] Id. at ¶ 28.

good faith attempt at settlement, a carrier, through the conscientious investigation of the complainant's concerns, should begin the assimilation of much of the information necessary to answer a complaint later brought on the same matter. Thus, the attentive defendant carrier, having already located much of the requisite information, should have little difficulty preparing and filing an answer within the 20 days following filing of a formal complaint.

The above obligations with respect to pre-filing discussions and specifically pleaded violations of the Act, Commission Order or Rule in question will also ensure that defendant common carriers are not disadvantaged by the obligation to reply to a complaint of necessity filed upon information and belief, supported by affidavits and the facts available to the complainant. TRA submits that in circumstances serious enough to warrant invocation of the formal complaint process, the filing of a complaint will rarely if ever constitute a resale carrier's first attempt to remedy the situation.

Indeed, given the resale carrier's total dependence upon its underlying network service provider for the wholesale services necessary to provide retail services to its resale customers, the filing of a formal complaint is much more likely to represent an absolute last ditch effort to obtain relief after significant and protracted attempts to obtain results from the service provider itself. It is thus extremely unlikely that defendant carriers will be drawn into the Commission's formal complaint process with less than a keen knowledge of those precise facts which the complainant has no hope of discovering until and unless a formal complaint is initiated. Thus, the Commission should not preclude resale carrier complainants from filing

complaints where the choices available to the complainant are either proceeding on "information and belief" or foregoing its pursuit of relief entirely.

As MCI observes, "[t]he complaint remedy would be irretrievably subverted if the most vulnerable competitors, not in a position to demand data from their monopoly service providers, were to be the least able to file complaints to remedy monopoly abuses."[19] TRA agrees with MCI that the Commission should accept complaints omitting specific information of discrimination where the complainant provides "a reasonable explanation in the complaint for the lack thereof, including efforts to obtain such support."[20]

TRA also agrees with the Commission that "disputes over the exchange of information believed to be proprietary or confidential result[] in lengthy delays in the formal complaint process."[21] As discussed above, however, carrier-to-carrier disputes are frequently characterized by a complete inability of the complainant to access relevant, often dispositive, information in the possession of the defendant carrier. TRA thus urges the Commission to strictly scrutinize defendants' reliance on §1.731 to ensure, to the greatest possible extent, that the Section will not become a routinely invoked device whose primary function is to retard the resolution of carrier-to-carrier disputes. TRA suggests that § 1.731(b) provides adequate protection against disclosure of information legitimately characterized as "confidential", prohibiting parties, counsel, Commission Staff -- in short, all persons receiving such information

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[19] Comments of MCI Telecommunications Corporation at p. 12.

[20] Id. at pp. 13-14.

[21] Notice at ¶ 79.

through the formal complaint process, from disclosing or using such information except as limited by the Rule.[22] The Commission should rely upon the protections of the Rule to safeguard the interests of parties compelled to provide confidential or proprietary information during the course of a formal complaint action; further expansion of the protections afforded by §1.731, however, would contribute to rather than minimize disputes over exchange of information and therefore should be avoided. Because such information frequently goes to the heart of the dispute, TRA is in agreement with MCI that "information claimed to be confidential due to its proprietary or sensitive financial or competitive nature should never be allowed to be withheld from the other party on that ground."[23]

C. The Commission Should Refrain from Adopting Rules that Would Increase Burdens Upon, and Limit Benefits to, Small Entities Seeking Redress of Grievances Through the Formal Complaint Process.

TRA discusses briefly below various other proposals raised in the Comments which would needlessly increase burdens upon complainants and correspondingly decrease the effectiveness of the formal complaint process. TRA urges the Commission to reject these suggestions because they will make more difficult the Commission's stated objective of "establish[ing] rules of practice and procedure which, by providing a forum for prompt resolution of complaints of unreasonable, discriminatory, or otherwise unlawful conduct by BOCs and other telecommunications carriers, will foster robust competition in all telecommunications markets."[24]

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[22] *See* 47 C.F.R. § 1.731(b).

[23] Comments of MCI Telecommunications Corporation at pp. 23-24.

[24] Notice at ¶ 2.

In keeping with its clear preference for local actions, Cincinnati Bell asserts that in situations where hearings are required because disputed fact issues cannot be resolved on the written materials, "[i]t would be inconvenient and burdensome on parties such as CBT, to require that hearings occur in Washington because all of the witnesses would have to travel. . . hearings should occur where the services giving rise to the alleged violation were rendered."[25] TRA sympathizes with Cincinnati Bell's predicament, however, in the interest of administrative expediency, the equities would appear to favor reducing inconvenience to Commission Staff who will certainly be involved in numerous formal complaints on an on-going basis, many or all of which will concern services giving rise to complaint allegations in diverse and scattered locations throughout the country.

Of more concern to TRA are the attempts of various commenters to prohibit the initial filing of a complaint for a significant amount of time -- up to 90 days after the complainant has given defendant notice of the intent to file a complaint. Bell Atlantic argues in favor of a process which does not pinpoint a precise number of days a complainant would be required to wait before filing a complaint; rather, the amount of time would remain nominally within the control of parties. Under Bell Atlantic's proposal, the complainant would provide defendant with a letter setting forth essentially the entirety of its proposed complaint and "within a reasonable time (to be negotiated between the parties), the defendant should be required to respond to the substance of the complainant's letter."[26]

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[25] Comments of Cincinnati Bell Telephone Company at pp. 12-13.

[26] Comments of Bell Atlantic at p. 3.

TRA has expressed above its support for pre-filing attempts to resolve disputes and believes that resale carriers routinely take great pains to resolve disputes whenever possible without resorting to the formal complaint process. However, TRA cannot support Bell Atlantic's proposal. The meaning attributed to the term "negotiation" by many entities within the likely pool of potential defendants is far from clear and thus, adoption of Bell Atlantic's proposal might frequently result in an indefinite delay in the ultimate resolution of complaints, a result which TRA is certain was not intended by Bell Atlantic in advancing the proposal.

Neither can TRA support the proposals of Communications and Energy Dispute Resolution Associates and Communications Venture Services, Inc., which would impose, respectively, service of the complaint upon defendant 14 days in advance of filing the formal complaint with the Commission[27] and a requisite pre-filing dispute resolution process extending up to 60-90 days in duration only after which a complainant would be permitted to lodge a formal complaint with the Commission.[28] Although the latter suggestion would more egregiously prolong the formal complaint process, TRA submits that both approaches would diminish the effectiveness of the streamlined complaint process with less than a countervailing increase in the number of disputes resolved without resorting to filing a formal complaint.

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[27] Comments of Communications and Energy Dispute Resolution Associates at p. 4.

[28] Comments of Communications Venture Services, Inc. and Richard C. Bartel and p. 1.

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to secure to complainants the continued ability to engage in discovery to fully document their claims, to streamline the formal complaint process as discussed above, and to avoid the imposition upon complainants of unnecessary burdens unlikely to enhance the efficiency of the formal complaint process.

Respectfully submitted,

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